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No. 86-284 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1986

MARGUERITE COOPER, ET AL.,
PETITIONERS

v.

GEORGE P. SHULTZ, SECRETARY OF STATE

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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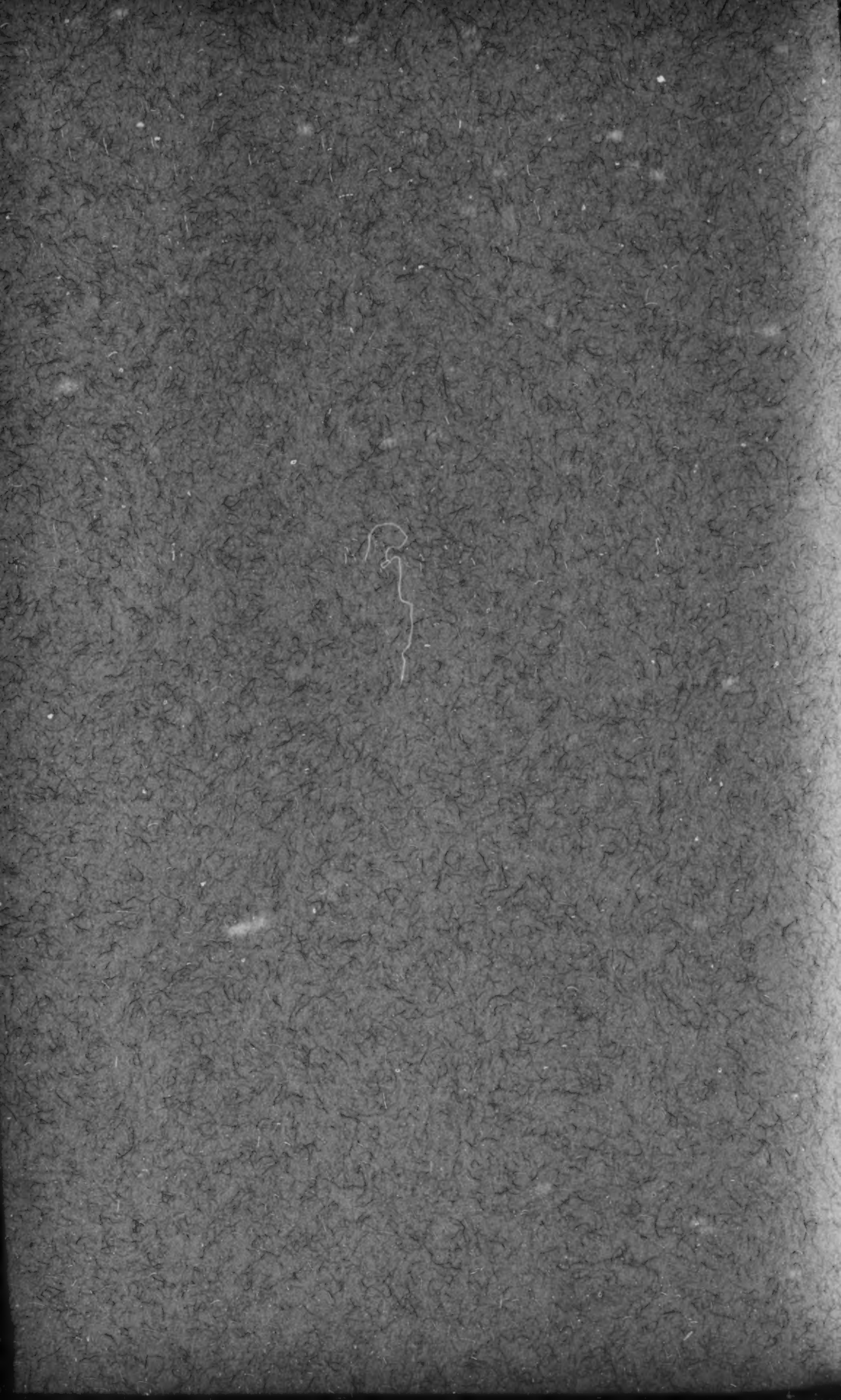
6 pp



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The Secretary of State filed a petition for a writ of certiorari in this case, *Shultz* v. *Cooper*, No. 86-86 (filed July 21, 1986), to challenge an award of attorneys' fees against the federal government under Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k). The fee award at issue is based on the attorneys' current, rather than their historic, hourly fee rates (to compensate for delay in payment) and is enhanced by 54.75% for quality of representation and by 20% for contingency. In the peti-

tion, the Secretary argues that the current rate lodestar is contrary to this Court's decision in *Library of Congress* v. *Shaw*, No. 85-54 (July 1, 1986), and its order vacating an earlier fee award based on current hourly rates at an earlier stage in this case (see *Shultz* v. *Palmer*, No. 85-50 (filed July 7, 1986)), and that the quality of representation enhancement appears inconsistent with this Court's decision in *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, No. 85-5 (July 2, 1986). The Secretary also notes in the petition that the validity of contingency enhancements was set for reargument in *Delaware Valley*. The Secretary's petition requests that the Court vacate the judgment of the court of appeals and remand the case for reconsideration in light of *Library of Congress* v. *Shaw* and *Delaware Valley*.

Respondents Cooper, *et al.*, opposed that petition (No. 86-86) and, on August 22, 1986, filed a cross-petition for a writ of certiorari pursuant to Rule 19.5. Cross-petitioners present the question whether the district court correctly used the actual billing rates of their attorneys, who are private practitioners, to compute the lodestar, rather than a hypothetical prevailing community rate (see Cross-Pet. i).

1. Cross-petitioners claim (Cross-Pet. 11-17) that the issues concerning the validity of a particular lodestar hourly rate and the appropriateness of a quality enhancement are "inextricably intertwine[d]" and, consequently, this Court should grant the cross-petition if the Court grants the Secretary's petition on the enhancement issue. This claim fails, however, because as cross-petitioners acknowledge in a supplemental brief recently filed with this Court, there is currently no bar to the district court's reconsideration of both issues should this Court grant only the

Secretary's petition. See Cross-Pet. Supp. Br. 4. The court of appeals recently filed an order in response to this Court's order in *Schultz* v. *Palmer*, No. 85-50 (July 7, 1986) that makes it plain that if the Court grants the Secretary's petition, the district court may reconsider both the quality enhancement and hourly rate issues. See Cross-Pet. Supp. Br. App. 1a-8a. Consequently, the cross-petition is unnecessary.

2. The cross-petition should also be denied because the question it purports to present rests on a mischaracterization of the decisions of the lower courts. Cross-petitioners are wrong in claiming that the district court's finding that the hourly rate (for determining the lodestar amount) should be based on their counsel's own billing rates is inconsistent with this Court's precedent. The district court did not apply an "irrebutable presumption" (Cross-Pet. 17) that a law firm's customary hourly rates establish the appropriate hourly rate for determining the lodestar amount. Nor did the court of appeals either in this case or in *Laffey* v. *Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984), cert. denied, No. 84-1655 (June 17, 1985) endorse such a view.

As the court of appeals stressed in its most recent order in this case (see Cross-Pet. Supp. Br. App. 7a-8a), *Laffey* did not create an *irrebutable* presumption in favor of a firm's own billing rates, but merely a presumption that a private attorney's billing rate is a reasonable fee in determining an award against the government. The district court properly applied the *Laffey* presumption and ruled that it had not been overcome in this case (see 86-86 Pet. App. 10a). The district court rejected cross-petitioners' claim that their law firm was not subject to *Laffey* because it was "a public interest law firm with no established

billing rate" and found instead that the firm had an "established billing rate" (*ibid.*). The court also found that, like the private counsel in *Laffey*, cross-petitioners' counsel had "chosen 'to cater' to a particular segment of the market by using lower rates, thereby avoiding competition from the 'premium' firms whose high rates could not be paid by plaintiffs' clients" (*id.* at 11a). We do not believe that further review of these inherently factual findings is necessary, but the district court will in any event have an opportunity to revisit the issue if the Court grants the Secretary's petition.

3. Finally, cross-petitioners contend (Cross-Pet. 17-21) that this Court should provide plenary review of the issues raised in this case rather than summarily vacating the judgment, as proposed by the Secretary, because the district court's decision is inconsistent with decisions of this Court. As discussed above, however, cross-petitioners misstate the district court's ruling and factual findings. In all events, as explained in the Secretary's petition, plenary review is not warranted because the lower courts should first have the opportunity to reconsider certain issues presented in this case in light of the Court's recent rulings in *Library of Congress* v. *Shaw* and *Delaware Valley*.

It is therefore respectfully submitted that the cross-petition for a writ of certiorari should be denied.

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